

STATE OF WASHINGTON

OFFICE OF PUBLIC DEFENSE



Annual Report

Fiscal Year 1999

FISCAL YEAR 1999

ANNUAL REPORT OF THE

WASHINGTON STATE

OFFICE OF PUBLIC DEFENSE

ADVISORY COMMITTEE MEMBERS

Judge Harold D. Clarke, Chair
Mr. Russell M. Aoki
Senator Mary Margaret Haugen
Mr. Mel Jackson
Senator Stephen Johnson
Representative Kathy Lambert
Ms. Mary McQueen
Representative Edward B. Murray
Mr. Andy Pascua
Ms. Catherine Smith
Judge Philip J. Thompson

Office of Public Defense

Joanne I. Moore, Director
Anne Hall, Deputy Director
925 Plum Street
Building 4, Third Floor
PO Box 40957
Olympia, WA 98504-0957
Telephone: (360) 956-2106
FAX: (360) 956-2112
E-Mail: opd@opd.wa.gov
Website: www.opd.wa.gov

INTRODUCTION

In 1996, the Office of Public Defense (OPD) was established to administer all constitutionally and statutorily required appellate indigent defense services in Washington State. In the three years of its existence the agency has successfully assumed these responsibilities formerly held by the Washington State Supreme Court and the Office of the Administrator for the Courts. The Office of Public Defense works to provide effective appellate representation for indigent people and to perform efficient payment services for defense work rendered in indigent appellate cases.

This report, published annually by the Office of Public Defense, is distributed after the end of the fiscal year because OPD's informational and statistical responsibilities are concerned mostly with state funds used on a fiscal year basis for indigent appellate cases.

OVERVIEW

- **OPD administers all appellate indigent defense services**
- **OPD also provides studies and recommendations about indigent defense services**

The Office of Public Defense administers state funds appropriated for appellate indigent defense, develops administrative procedures, standards, and guidelines for appellate indigent defense services, recommends criteria and standards for determining and verifying indigency, coordinates with the Supreme Court and the three Courts of Appeal to determine how attorney services should be provided, and provides studies and recommendations to the Legislature regarding indigent defense services in Washington State.

STRUCTURE

- **OPD has a small staff of attorneys and accountants, totaling five people**
- **OPD's work is efficient and its overhead is low, equaling 8% of the budget**

All administrative services are provided by a five-person staff, consisting of a director, a deputy director, an executive assistant, a fiscal analyst, and an accountant. The agency is overseen by an advisory committee comprised of legislators, judicial representatives, attorneys and lay people. The legislative authority for the agency is Chapter 221, Laws of 1996. The governing statute, which includes the agency mandate, is RCW 2.70.

The Office of Public Defense's administrative overhead cost is minimal compared to many state agencies, totaling 8% of the agency's budget. Efficient procedures have been developed by OPD staff to handle about 11,500 invoiced claims in FY 1999, in addition to fashioning and implementing improved payment methods and conducting substantive research projects.

MISSION STATEMENT

- **OPD's mission is to provide efficient and effective services**

The mission of the Office of Public Defense is to implement the constitutional guarantee of counsel on appeal by ensuring the effective and efficient delivery of indigent appellate services to Washington state residents.

INDIGENT APPELLATE FUNDS

- **State appellate defense services for indigent persons are constitutionally mandated**
- **Appointed attorneys located all over the state provide appellate defense representation**

The appellate courts of the State of Washington are divided into three geographical areas. Division One of the Court of Appeals has jurisdiction over appeals arising out of King, Snohomish, Skagit, Island, San Juan and Whatcom Counties. Division Two, located in Tacoma, has jurisdiction over appeals from Pierce County and all the counties to the south and west of Tacoma including Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Kitsap, Lewis, Mason, Pacific, Skamania, Thurston, and Wahkiakum Counties. Division Three, located in Spokane, has jurisdiction over all appeals arising in counties located east of the Cascade Mountains including Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Orielle, Spokane, Stevens, Walla Walla, Whitman, and Yakima. The Supreme Court has jurisdiction over all three appellate courts. Cases are appealed from superior court to the Court of Appeals.

The state pays for indigent appeals of criminal convictions, criminal sentences, determinations of dependency, challenges to parental terminations, appeals of criminal contempt, decisions involving civil involuntary commitment, and death penalty appellate cases at the state level. State funding is restricted to appeals as a matter of right, responses to state appeals, motions for discretionary review, petitions for review, personal restraint petitions in death penalty cases, and non-death penalty personal restraint petitions which the court has determined are not frivolous. All people accorded the right to state-funded counsel on appeal must first be determined to be indigent.

The Office of Public Defense does not provide direct representation of clients. Courts appoint attorneys to represent indigent people on appeal. The purpose of the agency is to process and approve for payment the invoices submitted by attorneys, court reporters, court clerks, and other service providers, and to work with the courts to ensure efficient and effective defense services.

PROCESS FOR PAYMENT OF INVOICES

- **Compensated work includes court reporter, county clerk, and attorney services**
- **OPD reviews all claims and compensates per rates set by the OPD Advisory Committee**

When a defendant appeals as a matter of right, the trial or appellate court appoints an attorney. Because there is both a federal and a state constitutional right to appeal, the state pays for the defendant's attorney if the defendant cannot afford to pay. The appointed attorney prepares and files a brief in the appellate court which has jurisdiction over the case. A transcript is also made of the trial. Once the transcript and brief have been filed, the Office of Public Defense reviews the invoices and pays the service providers for the work done. Invoices are received from appellate attorneys, court reporters, county clerks, who provide copies of documents filed in the trial case, and others. Payment is made based on a rate adopted by the Office of Public Defense Advisory Committee. Invoices are scrutinized closely by staff and, in death penalty cases, by a retired superior court judge who serves as an advisor to the agency. Payment is denied if reimbursement is not authorized.

ACCOMPLISHMENTS OF THE AGENCY IN FY 1999

1. Efficiently Handled and Paid all Appellate Indigent Defense Costs.

- **OPD saved or absorbed almost \$100,000 in additional or erroneous claims during FY 1999**

In FY 1999, OPD paid appellate indigent defense costs totaling \$5,564,721. These included expenses for death penalty defense attorneys, defense attorneys for Court of Appeals cases, court reporters, clerk's papers, and brief copying. Most of OPD's budget is spent on fixed, ongoing payments for these expenses, over which OPD has no discretion. However, whenever new obligations have been imposed by changes in the law, OPD has consistently implemented the most efficient payment policies possible.

When RAP 9.5(1), a new appellate rule requiring court reporters to furnish ASCII disks of court transcripts to the Courts of Appeal and defense attorneys was adopted in October 1998, OPD carefully considered what level of reimbursement was appropriate. After dozens of court reporters asked for payment ranging up to \$25 per disk, the OPD Advisory Committee set reimbursement at a reasonable \$2.75 per disk. This saved the state up to \$24,922 in FY 1999. **OPD is presently seeking a rule change to make ASCII disks optional upon the request of the court or attorney. This should save the state an additional estimated \$14,000 per biennium.**

When King County attempted in February 1999 to charge OPD eight times the usual transmittal charge for mailing sets of clerk's papers to the Courts of Appeal, OPD resisted the new charge. Paying the new King County charge would cost OPD about \$23,000 per year and would have cost \$7,776 in FY 1999. **OPD is presently calculating more reasonable reimbursement rates under the rules.**

In the fall of FY 1998, pursuant to the adoption of RAP 10.5(a), a new fee was charged to OPD for copies of transcripts for pro se defendants. The total cost to OPD was \$49,579. **At the end of the year, OPD negotiated a new contract for copying services in Division I that will save about \$12,381 in FY 2000.**

During FY 1999, OPD was praised by State Auditor representatives for diligently observing good accounting practices and strictly scrutinizing invoices. These measures resulted in rejected claims of over \$16,000 in FY 1999. In addition, 84 invoices were refused because they lacked proper documentation.

OPD has demonstrated its paramount interest in saving and protecting state funds whenever possible. In total, OPD handled its budget to save or absorb \$98,277 in FY 1999 from the payment of invoices and actively sought out ways to reduce and adjust the impact of those new law changes during FY 2000.

2. Restructured Payments in Death Penalty Appellate Cases

- **In response to Supreme Court and legislative requests, OPD created an efficient, updated payment system.**

During Fiscal Year 1999, the Washington Supreme Court and attorney providers became concerned about the rate of pay in appellate death penalty cases. The Court had been unable to appoint attorneys for three existing death penalty cases as no attorney would accept the then-current rate. In response to the Court's concern and a 1997 legislative request that OPD devise new death penalty defense payment recommendations, the OPD Advisory Committee created a new structure for payment of attorneys. As part of the new fee system, OPD contracts with attorneys appointed by the Supreme Court. The attorney contracts are for a capped fee, which covers estimated attorney services and all other expenses the attorney will incur during representation. If court orders requiring additional costs arise during the representation, OPD negotiates additional payments for those unpredicted costs as well. The capped fee system provides an appropriate increase in the hourly amount attorneys are paid in death penalty cases while providing cost controls. **The capped fee discourages excessive, unproductive attorney hours in death penalty cases.**

3. **Submitted "Report to the Supreme Court and the Legislature on Defense Fees and Costs in Washington State Appellate Death Penalty Cases"**

- **OPD analyzed existing state and national practices, which provided a foundation for the death penalty fee change**

This report was mandated by the 1997 Washington State Legislature, which directed the Office of Public Defense to study present reimbursement procedures in death penalty cases and to recommend standards and criteria to control costs but still provide defendants the constitutional right to representation at public expense. The OPD Advisory Committee's report developed several potential methods for reimbursement of attorneys in death penalty cases. **Rather than hire expensive consultants, OPD staff performed all research and writing of this report.**

4. **Underwent an Audit by the State Auditor's Office**

- **As a new agency, OPD was audited for the first time and received a perfect evaluation**

In April, 1999 the agency was audited by the State Auditor for the period of July 1, 1996 through June 30, 1998. The auditor concluded that all spending examined was appropriate, concluding that **"(i)n the areas examined, there were no instances of noncompliance or internal control weaknesses that were significant enough to report as a finding. We found that proper documentation was submitted for expenses and that necessary reviews were performed."**

5. **Managed an Attorney Services Quality Standards Project**

- **In response to judicial concerns, OPD staffed an appellate judge, commissioner, and attorney project to develop appellate attorney quality standards**

In 1997 the judges of the Court of Appeals, Division II approached the Office of Public Defense, asking the agency to staff a pilot project examining performance standards for indigent representation in Division II appeals. Thirteen attorneys were assembled, as well as judges and commissioners of the Court of Appeals. The group met several times during Fiscal Year 1998 and Fiscal Year 1999. The Division II Pilot Project was completed early in Fiscal Year 1999. **New performance standards were developed for the representation of indigent appellate defendants; all participants were judges or staff members of the Court of Appeals or OPD and volunteer attorneys donating their time.**

6. Provided Training for Appellate Attorneys in Division II

- **OPD managed three training sessions for 250 attorneys on quality appellate representation, at no facilities, materials, or speaker cost to the state**

As a result of the Division II Pilot Project, OPD coordinated training for practitioners in the Division II area during Fiscal Year 1999. The training, titled "Introduction to Appeals," consisted of day-long seminars held in three different locations, Port Orchard, Vancouver, and Tacoma. Minimal participant charges were collected by local bar associations to cover facilities and materials expenses. Appellate and Supreme Court judges gave presentations as well as appellate attorneys. Over 250 attorneys attended the well-received seminars.

All costs for the seminar were covered by local bar associations which collected a modest seminar fee. All speakers donated their time. **The training allowed judges and court staff to advise appellate attorneys how to comply with procedural requirements better, which will save court staff time in processing cases.**

7. Implemented New Division II and III Appellate Defense Contracts

- **OPD instituted contracts in eastern and southwestern Washington to ensure high-quality attorney work for state dollars**
- **Equal pay for equal work is implemented by the contracts throughout the state**

In response to attorney requests for pay parity between the divisions and an appropriation of \$558,000 for increasing Division II and III indigent appellate attorneys' fees, OPD instituted new contracts for appellate defense representation in Fiscal Year 1999. Even though the Legislature did not fully fund OPD's appropriation request, OPD implemented contracts to the extent possible. Requests for proposals were distributed to attorneys statewide, resulting in new appellate defense contracts covering many cases in 21 counties. These contracts institutionalize the appellate defense standards developed by OPD's Division II Pilot Project earlier in the year and establish quality-monitoring procedures. OPD is requesting a \$175,000 supplemental budget appropriation to fully implement the contracts.

Through the contract process, OPD was able to direct cases to conscientious, hard-working attorneys who devote an average of 40 plus hours to each appeal. **The contracts ensure that state funds are spent wisely for effective appellate services. Since attorneys who perform thorough research and write logical, readable products will perform the work, Court of Appeals time will also be saved.**

8. Analyzed Indigency and Verification Standards

- **Surveyed and researched indigency standards in Washington and other states performed by OPD**
- **Held a statewide indigency symposium for county indigency screeners**

OPD's enabling statute, RCW 2.70, directs the agency to recommend criteria and standards for determining and verifying indigency. In Fiscal Year 1999, data for a large study was collected from indigency screeners, judges, court personnel, and defense attorneys in every county in Washington. This data is being analyzed in findings and recommendations to improve indigency determinations in cases both at the appellate and trial level.

As a result of OPD's indigency study, a day-long symposium was held in May, 1999, for Washington state indigency screeners, providing them with verification training and networking opportunities. **The counties paid all travel expenses and the speakers were not paid. This symposium resulted in savings in an unknown amount due to improved trial and appellate indigency screening in the various counties.**

FUTURE PROJECTS

1. Juvenile Dependency and Parental Termination Cost Analysis

- **OPD assigned task of determining all dependency defense and children's representative costs paid by the counties**

The 1999 Legislature directed the Office of Public Defense to develop a proposal to address the costs of representation for indigent parents, guardians, legal custodians and children in dependency and termination hearings. OPD will address increased filings by the state, which prosecutes dependency and termination cases, as a result of amendments to RCW 13.34, and will analyze the effect of the increase on indigent defense costs. The OPD Advisory Committee is required to develop and recommend strategies for equitably funding indigent defense and children's representation in these cases and to present the proposal to the Legislature in December 1999.

OPD was not appropriated funds for this study. Instead, it is being conducted entirely by OPD's director and staff, with extensive input from court and attorney groups in King-Pierce, Benton/Franklin, Grays Harbor, and other counties.

2. **Extraordinary Criminal Justice Costs Project**

- **OPD assigned task of developing a claims prioritization procedure for aggravated murder costs that have hit county budgets hard**

Concerned about the crippling costs counties face in aggravated murder cases, the 1999 Legislature put the Office of Public Defense in charge of developing a plan for instituting procedures to process petitions by counties for reimbursement of costs incurred for investigation, prosecution, indigent defense, jury empanelment, expert witnesses, interpreters, incarceration, and other adjudication expenses in aggravated murder cases. In consultation with other state entities, OPD will develop procedures for processing, auditing, and prioritizing the counties' petitions.

In addition to instituting the extraordinary justice account petition process, OPD plans to develop a resource and reference bank for counties faced with aggravated murder cases - at no extra cost to the state. This resource bank will be available to advise counties of resources which have been successfully used in other parts of the state in these cases, which will save considerable county criminal justice system time in responding to the crisis of a large, complicated aggravated murder case.

CONCLUSION

OPD is a new state agency, but has already demonstrated its efficacy. Tasks assigned to OPD are carried out to the fullest appropriate extent by dedicated staff members. State dollars are valued and conserved whenever it is possible to do so while maintaining competent representation standards that comport with constitutional and legislative requirements. OPD has welcomed the opportunity to perform analysis, research, and reports for the Legislature and to participate in attorney improvement projects with the courts during FY 1999. Through these activities, OPD has been able to increase the positive impact of indigent defense services in Washington State, thus fulfilling its mission to "insure the effective and efficient delivery of the indigent appellate services funded by the state of Washington" established by the Legislature in RCW 2.70.005.

STATISTICAL REPORT

I. COSTS

These figures represent the total costs paid to attorneys representing clients in cases on appeal.

<u>Attorney Costs</u>	
Division I	1,906,422
Division II	1,015,853
Division III	668,909
Supreme Court	<u>431,132</u>
TOTAL	4,022,316

These figures represent the total costs paid to court reporters who have transcribed the record for cases on appeal.

<u>Court Reporter Costs</u>	
Division I	666,240
Division II	439,790
Division III	257,055
Supreme Court	<u>25,606</u>
TOTAL	1,388,691

These figures represent the total costs reimbursed to county clerks for reproducing the record for cases on appeal.

<u>County Clerk's Papers Costs</u>	
Division I	30,679
Division II	25,517
Division III	20,573
Supreme Court	<u>679</u>
TOTAL	77,448

These figures represent the total costs reimbursed to the Courts of Appeal for reproducing the briefs for cases on appeal.

<u>Brief Copying Costs</u>	
Division I	31,853
Division II	21,258
Division III	14,213
Supreme Court	<u>8,942</u>
TOTAL	76,266

II. STATISTICS

These numbers represent the number of invoices processed by the Office of Public Defense. This is not a reference to the number of cases filed nor does it refer to the number of clients served.

<u>Invoices</u>	
Court Reporter	3,466
County Clerk	2,562
Briefs	1,630
Attorneys	<u>3,842</u>
TOTAL	11,500

RCW CHAPTER 2.70

2.70.005 Intent. In order to implement the constitutional guarantee of counsel and to ensure the effective and efficient delivery of the indigent appellate services funded by the state of Washington, an office of public defense is established as an independent agency of the judicial branch.

2.70.010 Director—Appointment—Qualifications—Salary. The supreme court shall appoint the director of the office of public defense from a list of three names submitted by the advisory committee created under RCW 2.70.030. Qualifications shall include admission to the practice of law in this state for at least five years, experience in the representation of persons accused of a crime, and proven managerial or supervisory experience. The director shall serve at the pleasure of the supreme court and receive a salary to be fixed by the advisory committee.

2.70.020 Director—Duties—Limitations. The director, under the supervision and direction of the advisory committee, shall:

- (1) Administer all criminal appellate indigent defense services;
 - (2) Submit a biennial budget for all costs related to state appellate indigent defense;
 - (3) Establish administrative procedures, standards, and guidelines for the program including a cost-efficient system that provides for recovery of costs;
 - (4) Recommend criteria and standards for determining and verifying indigency. In recommending criteria for determining indigency, the director shall compile and review the indigency standards used by other state agencies and shall periodically submit the compilation and report to the legislature on the appropriateness and consistency of such standards;
 - (5) Collect information regarding indigency cases funded by the state and report annually to the legislature and the supreme court;
 - (6) Coordinate with the supreme court and the judges of each division of the court of appeals to determine how attorney services should be provided.
- The office of public defense shall not provide direct representation of clients.

2.70.030 Advisory committee—Membership—Duties—Travel and other expenses. (1)

There is created an advisory committee consisting of the following members:

- (a) Three persons appointed by the chief justice of the supreme court, including the chair of the appellate indigent defense commission identified in subsection (3) of this section;
- (b) Two nonattorneys appointed by the governor;
- (c) Two senators, one from each of the two largest caucuses, appointed by the president of the senate; and two members of the house of representatives, one from each of the two largest caucuses, appointed by the speaker of the house of representatives;
- (d) One person appointed by the court of appeals executive committee;
- (e) One person appointed by the Washington state bar association.

(2) During the term of his or her appointment, no appointee may: (a) Provide indigent defense services except on a pro bono basis; (b) serve as an appellate judge or an appellate court employee; or (c) serve as a prosecutor or prosecutor employee.

(3) The initial advisory committee shall be comprised of the current members of the appellate indigent defense commission, as established by Supreme Court Order No. 25700-B, dated March 9, 1995, plus two additional legislator members appointed under subsection (1)(c) of this section. Members shall serve until the termination of their current terms, and may be reappointed. The two additional legislator members, who are not on the appellate indigent defense commission, shall each serve three-year terms. Members of the advisory committee shall receive no compensation for their services as members of the commission, but may be reimbursed for travel and other expenses in accordance with rules adopted by the office of financial management.

2.70.040 Employees—Civil service exemption. All employees of the office of public defense shall be exempt from state civil service under chapter 41.06 RCW.

2.70.050 Transfer to office of appellate indigent defense powers, duties, functions, information, property, appropriations, employees, rules, and pending business—

Appointment—Effect on collective bargaining. (1) All powers, duties, and functions of the supreme court and the office of the administrator for the courts pertaining to appellate indigent defense are transferred to the office of public defense.

(2)(a) All reports, documents, surveys, books, records, files, papers, or written material in the possession of the supreme court or the office of the administrator for the courts pertaining to the powers, functions, and duties transferred shall be delivered to the custody of the office of public defense. All cabinets, furniture, office equipment, motor vehicles, and other tangible property employed by the supreme court or the office of the administrator for the courts in carrying out the powers, functions, and duties transferred shall be made available to the office of public defense. All funds, credits, or other assets held in connection with the powers, functions, and duties transferred shall be assigned to the office of public defense.

(b) Any appropriations made to the supreme court or the office of the administrator for the courts for carrying out the powers, functions, and duties transferred shall, on June 6, 1996, be transferred and credited to the office of public defense.

(c) Whenever any question arises as to the transfer of any personnel, funds, books, documents, records, papers, files, equipment, or other tangible property used or held in the exercise of the powers and the performance of the duties and functions transferred, the director of financial management shall make a determination as to the proper allocation and certify the same to the state agencies concerned.

(3) All employees of the supreme court or the office of the administrator for the courts engaged in performing the powers, function, and duties transferred are transferred to the jurisdiction of the office of public defense. All employees classified under chapter 41.06 RCW, the state civil service law, are assigned to the office of public defense to perform their usual duties upon the same terms as formerly, without any loss of rights,

subject to any action that may be appropriate thereafter in accordance with the laws and rules governing state civil service.

(4) All rules and all pending business before the supreme court or the office of the administrator for the courts pertaining to the powers, functions, and duties transferred shall be continued and acted upon by the office of public defense. All existing contracts and obligations shall remain in full force and shall be performed by the office of public defense.

(5) The transfer of the powers, duties, functions, and personnel of the supreme court or the office of the administrator for the courts shall not affect the validity of any act performed before June 6, 1996.

(6) If apportionments of budgeted funds are required because of the transfers directed by this section, the director of financial management shall certify the apportionments to the agencies affected, the state auditor, and the state treasurer. Each of these shall make the appropriate transfer and adjustments in funds and appropriation accounts and equipment records in accordance with the certification.

(7) Nothing contained in this section may be construed to alter any existing collective bargaining unit or the provisions of any existing collective bargaining agreement until the agreement has expired or until the bargaining unit has been modified by action of the personnel board as provided by law.